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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief amicus curiae is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 96,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case—that of the proper definition of confidential employee status under the National Labor Relations Act—is of major importance to Chamber members. The court below held that employees with access either to their employer's confidential labor relations information or to any other information that their employer considers confidential must be excluded from the coverage of the Act. The Chamber thinks that the court below correctly refused to accept the Labor Board's decision that the employee in question was covered by the Act. However, we are concerned that the court too readily moved from a rejection of the Board's narrow definition of confidential labor relations employees to the framing of a decision on non-labor grounds, without first redefining confidential labor relations employee status. For the reasons explained in this brief, we suggest that the court below should have held, as it did, that the Labor Board's definition of confidential labor relations employees is inadequate, but should have remanded the case to the Board with instructions to reassess the facts of this case under the proper labor relations definition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The brief filed on behalf of the National Labor Relations Board summarizes the Board's position as follows:

> The Board's present policy with respect to "confidential employees" is consistent with more than 40

> years of administrative and judicial practice, and with the legislative history of the Taft-Hartley amendments. [Brief at 14.]

That is hardly the case.

The Board's current policy is to exclude, in addition to managerial and supervisory employees, the confidential assistants to a company's labor relations manager and virtually no one else. Even to those confidential assistants the Board extends the right to strike and to participate in all other forms of concerted activity except collective bargaining.

This policy is at odds with the Board's decisional history up to 1946. During that early period, it excluded employees elsewhere in the company whose jobs required them to learn all or part of their employer's confidential labor relations information. The policy is also at odds with the congressional understanding in 1947 that the Board was treating "persons working in the labor relations, personnel and employment departments" and "confidential secretaries" as "outside the scope of the act," and the congressional "presumption" that the Board "will continue" to do so.[1] The policy as applied in particular cases has been described by one court of appeals as "incredibl[e]," and by another court of appeals as "patently unfair."[2] In short, the policy is not consistent with the Board's early decisional history and the congressional understanding, and needs to be made so.

The Board's early policy recognized, as its current one does not, that there is a direct and substantial conflict between an adversarial labor relations relationship and the possession of confidential managerial labor relations

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[1] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947).

[2] *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 649 (6th Cir. 1977); *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 694 (4th Cir. 1963).

information by an employee who is an adversary in that relationship. Management is severely handicapped if the nonsupervisory employees who know its labor confidences are subject to a divided loyalty. Yet the current rule of the National Labor Relations Board, in defiance of its own early history and the intent of Congress, mandates exactly such a divided loyalty in most instances.

The Labor Board, in its brief to this Court, seeks to obscure the absurdity of the Board's present rule on confidential labor relations employees by emphasizing the unfairness of a rule that would exempt from bargaining employees with access to confidential information unrelated to labor relations. The purpose of this brief is to refocus for the Court the lack of fairness inherent in the Board's present rule and to suggest that the Board has subverted the intent of Congress in its treatment of confidential labor relations employees.

ARGUMENT

The Board's current attitude toward confidential labor relations employees has its origins in the Board's vacillation and contradictory treatment concerning the status of supervisors before 1947. The Board's early ruling that supervisors were precluded by conflict of interest from bargaining collectively against their employer was accompanied by a similar ruling with respect to employees with access to their employer's confidential labor relations information. Shortly after the Board reversed its position on supervisors, it changed its position on confidential labor relations employees in a way that emphasized employee rights at the expense of conflict of interest concerns. Accordingly, it is necessary to begin an analysis of the confidential employee issue with a discussion of the supervisory issue.

In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947), this Court said:

> If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark. But there are difficult questions of policy involved in these cases which, together with changes in Board membership, account for the contradictory views that characterize their history in the Board. [Footnote omitted.]

Packard, of course, involved the question whether it was consistent with national labor policy as articulated by Congress to place supervisors, who represent management, in an adversarial role against management by according them collective bargaining rights. This Court's holding that Congress had given the Board the discretion to extend such rights to supervisors caused Congress to clarify its intent in the Labor Management Relations Act of 1947 by excluding supervisors from the coverage of the National Labor Relations Act. Congress did so, in part, because it felt that management was entitled to undivided loyalty within its own ranks. The House Report said:

> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [Emphasis in original.]

H.R. Rep. No. 245, 80th Cong., 1st Sess., 17 (1947).

Some years later, the failure of the Board to adhere to the intent of the 1947 Act caused this Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), to remind the Board that it was not free to ignore the congressional purpose by using an omission in statutory wording to

give collective bargaining rights to managerial employees other than supervisors. This Court told the Board in *Bell Aerospace* that since the congressional purpose was clear, the Board could not manufacture a grant of administrative discretion out of the congressional preoccupation with supervisors and the consequent failure expressly to exempt other mangerial employees.

All of these themes, with some differences in detail, are present in the instant cases. The history of the Board's decisions is characterized by inconsistency, although here Congress was not aware that the Board had made a basic change in its position while the 1947 Act was under consideration. The policy issue is the same, that of loyalty in the performance of a management function, although here the persons involved are employees who assist management rather than the members of management itself. The congressional intent from 1947 that such persons not have collective bargaining rights is clear. And this Court is again called upon to remind the Board that omissions in statutory wording are not a license to ignore the congressional purpose.

From *Brooklyn Daily Eagle*, 13 N.L.R.B. 974 (1939), to *Bethlehem Steel Co.*, 63 N.L.R.B. 1230 (1945), the Board decided 57 cases [3] in which it consistently developed the doctrine that it would be incompatible with their duties for employees whose assignments involve access to their employer's confidential labor relations information to have an adversarial collective bargaining relationship with their employer. By 1944, the Board was disposing of such cases by referring to a well-established history.

In *Hoover Co.*, 55 N.L.R.B. 1321 (1944), the Board was asked to permit a bargaining unit consisting of 33 "hourly paid stenographers and clerical workers in the

[3] The AFL-CIO has listed all of the cases in an appendix to its amicus brief.

foremen's, general foremen's, and superintendents' offices." *Id.* at 1322. These employees, many of whom were in pools, prepared "reports dealing with confidential instructions regarding employees' overtime allowances, earning adjustments, rate change requests, etc." and worked with "correspondence between members of management and the supervisory groups herein, and confidential memoranda and reports arising from the investigation of grievances or pertaining to other labor relations matters." *Id.* at 1322-23. In denying the request for bargaining, the Board said:

> We have previously expressed our awareness of the fact that in negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters. Since the unit here sought is confined solely to employees of the aforementioned confidential type, we are of the opinion that the unit is inappropriate for the purposes of collective bargaining and, accordingly, that no question has arisen concerning the representation of employees of the Company in an appropriate bargaining unit. [*Id.* at 1323, footnote omitted.]

Although the Board in *Hoover* theoretically left open the possibility that confidential labor relations employees could be represented by a union which represented no other employees of the employer, the Board appeared to close that door as well in *Electric Boat Co.*, 57 N.L.R.B. 1348 (1944). The Board there spoke categorically:

> In short, the shop clerks in the course of their duties acquire such confidential knowledge of labor relations matters as would warrant their exclusion from any bargaining unit otherwise found to be appropriate and, equally, render inappropriate any unit composed solely of such employees. [*Id.* at 1349, footnote omitted.]

While it was developing its doctrine on confidential labor relations employees, the Board also was taking the position that supervisors were not entitled to collective bargaining rights. *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943); *Boeing Aircraft Co.*, 51 N.L.R.B. 67 (1943). The Board first reversed its position on supervisors in *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), with the results previously noted. Then in 1946, the Board made a basic change in its doctrine on the exclusion of confidential labor relations employees.

In *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946), the Board decided that employees who work with confidential labor relations information should not be excluded from bargaining unless they also function in a "confidential capacity" to a labor relations manager who is charged with "formulating, determining and effectuating" the employer's labor policies. *Id.* at 1322. The Board explained that this new definition of a confidential labor relations employee would allow bargaining by employees who "merely supply" confidential information to a labor relations manager, because such employees would not be assisting management in the use of such information. The definition also would obviously allow bargaining by employees who merely assist in formulating, *or* determining, *or* effectuating labor policy, but do not assist in all three categories. *Id.* Thus most, if not all, of the employees excluded in cases like *Hoover* would now be allowed to bargain against their employer.

The Board's only explanation for this result was that the old definition was "needlessly preclud[ing] many employees from bargaining collectively together with other

workers having common interests." *Ford* at 1322. The sole emphasis in *Ford* was on employee rights, and there was no attempt to explain how the needs of the employer as recognized in the *Hoover* decision could be accommodated within the new definition.

The *Ford* approach was followed in three other cases the same year, *St. Louis Independent Packing Co.*, 67 N.L.R.B. 543 (1946), *Tennessee Gas & Transmission Co.*, 67 N.L.R.B. 1375 (1946), and *Browne & Sharpe Manufacturing Co.*, 68 N.L.R.B. 487 (1946).[4] Unlike *Packard*, these cases were not appealed and apparently escaped the notice of Congress. Although the House in 1947 legislated an exclusion for confidential labor relations employees as part of a definition expanding the exclusion of confidential employees beyond the labor relations nexus to cover employees with access to trade secrets, the Senate did not agree to such an expanded definition. The final bill contained a statutory definition of "supervisor" to reverse the *Packard* case, but the House and Senate conferees explained that it was unnecessary to write a definition for confidential labor relations employees since the Board was already treating "persons working in the labor relations, personnel and employment departments" as "outside the scope of the act" and "presumably will continue" to do so. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947). The Conference Report said:

> As heretofore stated, both the House bill and the Senate amendment excluded supervisors from the individuals who are to be considered employees for the purposes of the act. The House bill defined as "supervisors", however, certain categories of employees who were not treated as supervisors under the Senate amendment. These were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, check-

[4] This listing of cases is drawn from the appendix to the AFL-CIO's amicus brief.

ers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of "supervisor" to individuals generally regarded as foremen and persons of like or higher rank.

The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. [*Id.*]

The Conference Report is consistent with the Board's *Hoover* decision, but not with the Board's *Ford* decision. The congressional reference to the exclusion of nonsupervisory employees in the labor relations, personnel, and employment departments focuses on persons who work with confidential labor relations information, without requiring that they also function in a confidential capacity to a labor relations manager. Indeed, the Conference Report goes on to refer to a second group of employees called "confidential secretaries," who obviously have a relationship to management that the first group does not.

After passage of the 1947 Act, the Board followed its *Ford* decision until 1952. It then decided at least three cases in which it classified employees as confidential based on their access to labor relations information rather than their role in developing and implementing policy. These three cases were overruled in 1956 in *B. F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), in which

the Board reviewed and restated the *Ford* doctrine, as follows:

> Since the early *Ford Motor Company* case, in which definitions theretofore accorded the term "confidential employees" were reexamined, the Board has consistently excluded from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Although announcing its intention in the *Ford Motor Company* case to limit the term "confidential" so as to embrace only such employees, the Board has, from time to time since that decision, expanded its view as to what constitutes a confidential employee by designating as "confidential," for example, secretaries to persons involved in the handling of grievances[5] and cashiers having access to labor relations policy data.[6] Upon further reexamination of our holdings in the instant connection, we are still of the opinion expressed in the *Ford Motor Company* case that any broadening of the definition of the term "confidential" as adopted in that decision needlessly precludes employees from bargaining collectively together with other employees sharing common interests. Consequently, it is our intention herein and in future cases to adhere strictly to that definition and thus to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations.[7]

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[5] *International Smelting & Refining Co. (Raritan Copper Works)*, Case No. 4-RC-2143 (not reported in printed volumes of Board Decisions and Orders), upon which the Employer relies herein, is one such case.

[6] *Bond Stores, Incorporated*, 99 NLRB 1029.

[7] To the extent that *Minneapolis-Honeywell Regulator Co.*, 107 NLRB 1191, relied upon by the Employer, and the cases cited in footnotes 5 and 6 and other cases are inconsistent with the views expressed herein, they are hereby overruled.

Id. at 724 (emphasis in original, footnote 4 omitted).

The *Ford-B. F. Goodrich* doctrine has led to a number of absurd results. For example, in *Westinghouse Electric Corp.*, 138 N.L.R.B. 778 (1962), the Board included in the bargaining unit two industrial relations assistants who administered the employer's procedures for hiring, upgrading, downgrading and recalling employees. *Id.* at 780. They interviewed applicants, gave tests, graded them according to company standards and referred the applicants to supervisors for hire. *Id.* They interviewed employees for upgrading, and processed and explained the "bumping" rights to employees in reduction in force situations. *Id.* at 781. Despite this extensive involvement in personnel matters, the assistants were included in the unit, both even becoming the equivalent of shop stewards for the union. *Id.* at 780.

In *Hudson Waterways Corp.*, 193 N.L.R.B. 378 (1971), the Board addressed the issue of whether "ships paymasters" are confidential employees. These persons worked directly under the chief paymaster in jobs that are similar to those performed in employment, personnel or labor relations departments, but tailored to the particular needs of the shipping industry. At the time a ship neared port, the paymaster first studied the ship master's payroll and determined potential areas of dispute, which he then discussed with the chief paymaster for direction on dispute settlement based in part on the pertinent bargaining agreement. He next compiled the payroll sheets and notified the union agents, shipping commissioner and local port authority about the payoff so they could attend. On board ship he audited the master's payroll, and attempted to settle disputes with the master based on the bargaining contract. Some of the more difficult disputes were passed back to the chief paymaster for settlement. The paymasters were even consulted by management officials for their opinions on developing future bargaining positions. Despite this active involvement in labor matters in a position where the paymaster

often represented the employer vis-a-vis the employees or the unions, they were included with the rank and file employees in the bargaining units.

Again, in *California Inspection Rating Bureau*, 215 N.L.R.B. 780 (1974), the Board included in the bargaining unit two accounting clerks even though they had access to "personnel files and confidential material of all Bureau employees and assist in preparing the information regarding advice on personnel matters", "assist in preparing budget estimates for personnel items", and "frequently have knowledge of various personnel decisions made by the Bureau before the employees affected by those decisions are made aware of the action by their supervisors." *Id.* at 783. The Board included them in the unit on the ground that they did not act in a confidential capacity to one who formulates, determines and effectuates management labor policies. *Id.* Nonetheless, they were active in the employer's labor matters and were privy to confidential labor information.

Since the *B. F. Goodrich* decision in 1956, the Board has consistently refused to exclude employees on the basis of the confidentiality of the labor relations information with which they work. See, for example, *Goldblatt Bros., Inc.*, 118 N.L.R.B. 643 (1957) (assistant to store's personnel supervisor and two assistants to the paymaster included even though they had access to confidential personnel and payroll records). The Board usually includes these employees without ever determining whether the personnel files to which they have access are confidential. See *San Diego Transit Corp.*, 182 N.L.R.B. 428 (1970) (includes secretary to controller and secretary to safety and personnel directors, both of whom had access to employees' personnel records); *Locomotive Firemen & Enginemen*, 145 N.L.R.B. 1521 (1964) (includes assistant chief clerk who had access to personnel files).

The Board has even included in bargaining units secretaries who work for plant or branch managers in charge of all the day-to-day operations of their employees, usually on the ground that these managers are not involved in labor, personnel or employment matters because they receive headquarters guidance. Chairman Miller refused to concur in these decisions, finding instead that

> the fact that the manager is the Employer's principal representative and agent at the branch office necessarily involves him in the day-to-day formulation, determination, and effectuation of labor relations policy at the office, both in creating solutions to difficulties that may suddenly arise and in applying to the particular operations and problems of his branch labor policies established in broad outline at the home office.

Empire Mutual Insurance Co., 195 N.L.R.B. 284, 286 n.8 (1972) (Miller, Chairman, dissenting). See also *Holly Sugar Corp.*, 193 N.L.R.B. 1024, 1026-27 (1971) (Miller, Chairman, dissenting). Recently, the Board also refused to exclude secretaries who type merit evaluations and other personnel documents on the ground that the "record does not demonstrate . . . that these secretaries have input into the substantive creation of documents relating to merit evaluations, disciplinary actions, or related activities." *United States Postal Service*, 232 N.L.R.B. 556, 558 (1978).

Finally, the Board qualifies its confidential employee exclusion with a series of conditions that have no analytical relation either to the confidentiality of the subject matter or to the work done by the employee in question. The fact that an employee assists in grievance proceedings is insufficent in the Board's view for exclusion. *Curtiss-Wright Corp.*, 101 N.L.R.B. No. 1, 31 L.R.R.M. 1005 (1952). If the employee's superior is only involved

in labor matters from an advisory standpoint, *Eastern Corp.*, 116 N.L.R.B. 329, 333 (1956), or only on a departmental rather than plant or company-wide basis, *Ethyl Corp.*, 118 N.L.R.B. 1369, 1371 (1957), the employee will not be deemed confidential. As previously mentioned, on-site employees are not considered confidential even when they negotiate payroll disputes directly with union representatives. *Hudson Waterways Corp.*, 193 N.L.R.B. 378 (1971).

Most of the appellate decisions reviewing the Board's *Ford-B. F. Goodrich* doctrine have accepted the Board's confidential employee definition without critical analysis,[5] although several of them have bridled at the Board's results.[6] The reaction of the Fourth Circuit in *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690 (4th Cir. 1963), is illustrative. Without questioning whether the Board has discretion to fashion its own confidential employee definition, the court held that the Board had "exceeded the bounds of proper discretion" on the facts of the case before it by refusing to exclude the branch office clerk. *Id.* at 694. The court went on to explain:

> The undisputed evidence indicates that this employee is privy to confidential communications con-

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[5] Of the cases cited in the Board's brief at pages 31-32 and note 37, none addresses the legislative history of the 1947 Act or the difference between the Board's *Hoover* rule and its *Ford-B. F. Goodrich* rule. In one of those cases, *NLRB* v. *California Inspection Rating Bureau*, 591 F.2d 56 (9th Cir. 1979), the issue of confidential employee status was neither presented to nor considered by the court.

[6] In addition, to the Seventh Circuit decisions under review here, and *NLRB* v. *Quaker City Life Insurance Co.* (discussed in the text immediately following this note), see *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 649 (6th Cir. 1977) (the court found the Board's refusal to exclude the personal secretary to the general manager of the plant, who was also the company's labor relations administrator at the plant, to be "incredibl[e]").

> cerning labor relations between the insurance agents and the employer. She is intimately aware of all communications between the District Manager and the home office concerning recommended wage and expense allowance adjustments, personal attitudes of the agents, the agents' performance, and remedial action connected therewith, and recommendations on employment termination.
>
> It would be patently unfair to require the company to bargain with a union that contains such an employee. [*Id.*].

The results in many of the Board's confidential employee decisions are so patently unworkable that it is difficult to believe Congress in 1947 could have approved them, even without the legislative history showing that Congress intended to have the Board exclude all confidential labor relations employees. As the Board itself said in *Maryland Drydock Co.*, 49 N.L.R.B. 733, 738 (1943):

> While the maxim *inclusio unius est exclusio alterius* is a well-established canon of statutory construction, the courts have recognized its limitation, where its application leads to results so absurd as to make it unreasonable to believe that they were intended by Congress. [Footnote omitted.]

The Board's treatment of confidential employees is another illustration of the limits of the maxim.

Even where the Board has found employees to be confidential under the *Ford-B. F. Goodrich* doctrine, it has insisted that they are entitled to engage in all aspects of union activity except bargaining with other employees. In *Peavey Co.*, 249 N.L.R.B. 853 n.3 (1980), the Board recently reiterated this position, citing for support two cases in which the courts of appeals had disagreed with the Board:

> Confidentials have a much different status [than supervisors] in that employers are not entitled to

restrict their protected activities. Thus, whether or not Respondent honestly viewed Snider as a confidential employee is of no moment here since Snider was entitled to engage in such activities even if she were a confidential. *Wheeling Electric Company*, 182 NLRB 218 (1970), enforcement denied 444 F.2d 783 (4th Cir. 1971); *Peerless of America, Incorporated*, 198 NLRB 982 (1972), enforcement denied in relevant part 484 F.2d 1108 (7th Cir. 1973). See also *Los Angeles New Hospital*, 244 NLRB No. 157, fn.4 (1979).[7]

The Board's position is again illogical. The problem of divided loyalty is not solved by a rule saying that confidential employees may not participate in bargaining but may participate in strikes and grievances. Moreover, the Board's position again ignores the congressional intent. The Conference Report to the 1947 Act expressed the understanding that "the Board has treated, and presumably will continue to treat, such persons as *outside the scope of the act.*" H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added). As the Fourth Circuit said in *NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783, 786 (4th Cir. 1971):

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[7] Strangely enough, the Seventh Circuit has just enforced this portion of the Board's order without explanation. *Peavey Co.* v. *NLRB*, —— F.2d ——, 107 L.R.R.M. 2359, 2361 (7th Cir. 1981). There is probable cause to believe that this was an oversight on the part of the Seventh Circuit since Circuit Judge Sprecher, who wrote both of the *Hendricks* decisions presently before this Court, also participated without dissent in the *Peavey* decision. In both *Hendricks* decisions, the Seventh Circuit held that confidential employees must be excluded from the National Labor Relations Act entirely, *Hendricks County Rural Electric Membership Corp.* v. *NLRB*, 603 F.2d 25, 30 (7th Cir. 1979), 627 F.2d 766, 768 (7th Cir. 1980). Moreover, the Seventh Circuit had earlier reached the same conclusion that total exclusion was required in *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108 (7th Cir. 1973), cited by the Board above.

> There is admittedly nothing in the amended Act which explicitly indicates that confidential employees are to be excluded from its coverage. But there is a congressionally expressed reason for that omission plus a clear expression of a legislative intention to exclude them from the Act. That is enough.[8]

It is unreasonable to believe that Congress intended any other result.

The Board may have been less than clear on this point before 1947. On the one hand, the Board persuaded the only court of appeals to address the question before 1947 that an employee excluded as a confidential secretary from bargaining with other employees was entitled to join them in a strike. *NLRB* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210 (3d Cir. 1943). On the other hand, the Board's language in its 1944 *Electric Boat* decision, quoted at pages 7-8 above, was so categorical about the exclusion of confidential employees from "any bargaining unit" that Congress may justifiably have concluded that other kinds of concerted activity with the bargaining unit would be out of the question. Given the legislative history of the 1947 Act, it is fair to say that if Congress had considered *Poultrymen's Service Corp.* to be the law, it would have been outraged, as it was with the Board's *Packard* decision on supervisors.

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[8] *Wheeling Electric* is the leading court of appeals decision on the right of concededly confidential employees to participate in union activities other than bargaining. The Fourth Circuit in *Wheeling* rejects the contrary decision of the Fifth Circuit in *NLRB* v. *Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970), on the ground that the court there failed to consider the legislative history of the 1947 Act at all. The only other contrary court of appeals decisions after 1947 are an enforcement without opinion of the Fifth Circuit in *NLRB* v. *Service Technology Corp.*, 480 F.2d 923 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) (which presumably relies upon *Southern Greyhound*), and the Seventh Circuit decision in *Peavey Co.* v. *NLRB* (discussed in footnote 7 above), neither of which mentions the 1947 Act.

CONCLUSION

The Board in the instant case found that the personal secretary to respondent's general manager and chief executive officer was protected by the National Labor Relations Act. The court below refused to enforce the Board's order because it concluded, after one unsatisfactory remand for additional findings, that it and the Board were in irreconcilable disagreement over the proper standard to be used in determining confidential status.

The source of that disagreement is that the Board's current rule defines confidential labor relations employees far too narrowly. The court below bridled at the result, as had the Fourth Circuit in *Quaker City Life Insurance Co.* and the Sixth Circuit in *Allied Products Corp.*, discussed at pages 15-16 above. Unlike those courts, which had simply rejected the Board's result without questioning the definition, the Seventh Circuit here questioned and rejected the definition itself. Rather than mandating a broader definition of confidential labor relations employees, however, the Seventh Circuit excluded the employee in question as confidential on non-labor grounds that may have been unnecessarily broad.[9]

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[9] *Compare* the Seventh Circuit's uncritical acceptance of the Board's finding that the general manager's personal secretary did not have access to confidential labor information *with* the Sixth Circuit's rejection of the Board's findings in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977), another case involving the personal secretary to a general manager. In that case, as in this one, there was no evidence of the precise information to which the secretary had access. The Sixth Circuit there said:

> Once an employer has demonstrated that a secretary prepares and reads labor relations materials, it need not provide a list of the particular documents that have flowed through the secretary's hands unless the charging party has at least introduced evidence which contests the general statement. [*Id.* at 649.]

It seems highly likely that the secretary here at least had access to work schedules and other information affecting the employees

It is time, we suggest, for this Court to determine the proper definition for confidential labor relations employees. We ask that this Court remand this case to the Board with instructions to reassess the facts under the proper standard.

That standard, we submit, is reflected in the Board's reasoning in *Hoover* and not in its reasoning in *Ford-B. F. Goodrich*. The essential differences between the two rules, as the Board has applied them, is that under the *Hoover* rule employees are excluded because of what their jobs require them to learn in confidence, whereas under the *Ford-B. F. Goodrich* rule employees are excluded only if they have a central role in the formulation, determination, *and* effectuation of policy.

The Board should be told to exclude employees who are privy to their employer's confidential labor relations information, in whole or in part. The Board should also be reminded that its factual definition of "labor relations" information in *Hoover* is as broad as the definitions of bargaining contained in Sections 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 158 (d) and 159(a), and properly so; any information about

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before they had access to it, because she "typed all of [the general manager's] correspondence." *Hendricks County Rural Electric Membership Corp.*, 247 N.L.R.B. No. 68, 103 L.R.R.M. 1129, 1130 (1980). Moreover, the secretary here "share[d] a partitioned office with Dillon," the general manager. *Id.* It is hard to believe that she could share an office with the general manager and not be privy to confidential information affecting the employees.

The Board made much of the fact that "while she opened mail addressed to Respondent and Dillon, . . . she never saw copies of correspondence from Respondent's lawyers to the union . . . ." *Hendricks County Rural Electric Corp.*, 236 N.L.R.B. 1616, 1619 (1978). Aside from the fact that correspondence with the union would hardly be confidential from the employees, the rest of the mail that she opened must have contained, at the least, proposals, plans and decisions affecting the employees to which the latter did not then have access.

"wages, hours, and other terms and conditions of employment," to quote Section 8(d), is labor relations information, and is confidential if it has not been released to rank-and-file employees. Finally, the Board should be told that the exclusion of confidential labor relations employees from bargaining also precludes giving them concerted activity rights that are inconsistent with the exclusion.

Respectfully submitted,

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